But in the old days the post office used to issue postal stamps which were used throughout the Federated Malay States, and there are plenty of matters performed by an officer in one State which extend to the other States as well. Therefor I do not attach much importance to that argument.

Now, the Enactment, must be looked at as a whole. At the very beginning it is stated that it is an Enactment for the control and the licensing of dealers in second-hand goods. The Enactment proceeds to make provision as to licences, and then makes provision for the carrying out of the Enactment by rules. These rules are to be made by the Resident in each State. In fact no rules have been made. But there is nothing to prevent the making of a separate set of rules for each State.

Furthermore, the Resident of each State has the power to vary the second schedule. That would vary the licence granted in accordance with the third schedule. The second schedule might be varied in each of the four States. If then, one licence under the third schedule is to cover the four States, it would be a licence the terms of which might be different according to the four States and also subject to different rules. That would surely be an impossible situation.

But there another important provision contained in section 11. I do not think that this has been referred to in the course of argument. Section 11 provides that:—

> "In any State the Resident may at his discretion at any time cancel any licence issued or exemption made under this Enactment".

It would indeed be difficult to construe that section if the licence covered the whole of the four States. It might be that it could only be cancelled as to one State, and yet be in force in the other three.

In view of the matters which I have dealt with above, I am of the opinion that the licence is limited to each individual State. So, if a person wishes to carry on his second-hand business throughout the Federated Malay States, he must obtain a separate licence in each State or four licences altogether.

It has been argued that this is extremely inconvenient. It must, however, be remembered that the Enactment was passed in 1926, and at that time businesses of dealing in second-hand goods may not have attained the importance that they seem to have reached now. But that is a matter for the Legislature, and not for this Court to deal with.

I am satisfied that the learned Magistrate should have convicted. The judgment of acquittal is, therefore, altered to a judgment of conviction. Inasmuch as the object of the appeal was to obtain a judicial decision on the question raised, it is not necessary to pass more than a formal sentence. I accordingly impose a fine of one dollar.

Appeal allowed. Accused found guilty and sentenced to fine of $1.

[APPELLATE CRIMINAL JURISDICTION]

THOMAS, C.J.

July 29, 1937.

LOH CHAK WAN.....Appellant.

v.

PUBLIC PROSECUTOR.....Respondent.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 33 of 1937]

Customs Enactment, 1936—section 114 (h) and (e)—Knowingly concerned in fraudulent attempt at evasion of Customs duty—Knowingly in possession of uncustomed goods—Onus—Explanation consistent with innocence.

Where the duty of giving an explanation is cast upon a defendant, and an explanation is given, which is consistent with innocence, the Court must consider whether it might reasonably be true although not convinced of its truth.

W. G. W. Hastings for appellant.

C. H. Whitton for the Public Prosecutor.

THOMAS, C.J.—This is an appeal from a conviction by a learned Magistrate of Kuala Lumpur under the Customs Enactment. The learned Magistrate was commendably brief in his judgment, and I will try to be equally brief.

The learned Magistrate says:—

> "I am of the opinion that Loh Chak Wan has not proved that he had no knowledge. In the ordinary course of business he should have been aware of the type of goods in which he was dealing. The letter 'Q' shows these goods were not quite ordinary. I believe that he was aware of the contents of Q".

The onus of proving that goods are not uncustomed is cast upon the defendant. It is the duty of the prosecution to prove that the defendant is concerned in any fraudulent evasion.

The defendant stated that he was a newcomer to the business, and had carried it on with regard to the goods in question (Tick Chu Sai Yau—a Chinese sauce said to contain more than 40 per cent. of sugar and so dutiable) in the same

way as before. He did not know that the goods contained sugar or were dutiable. This knowledge depends on letter "Q". The letter was written in Chinese, and a translation has been put in. Sung Kwok Lau a translator attached to the Magistrate's Court when recalled said:—

> "The phrase in the original is vague..... the writer does not seem to be very well educated.....it could be taken to mean the railway department".

A doubt as to the meaning is created by this evidence.

Translation of letter "Q":

Messrs. Cheong Chan Hup Kee.

Gentlemen,

We were in receipt of your letter yesterday and its contents were noted accordingly.

With regard to the 5 casks of "Tik Choo Si Yow" (i.e. Chinese Sauce) you instructed us to obtain for you, we would have sent them to you immediately (so as to enable you) to meet the demands of the market if not on account of some difficulty arising recently in connection with this commodity.

We heard that more than 10 casks were sent to Perak at the end of last year. The Railway Department (? or the Customs Department) found that these goods were inferior in quality and (therefore) disallowed their consignment but insisted on their being handed over for examination.

Later, we heard from people (of this Department?) that consignment of these goods could be allowed as usual without examination on a payment of $1.50 per cask. Eventually this was got through.

However, it is now said by the people concerned that $2 per cask must be paid before they can allow the same thing to be done.

On this account we dare not send the goods to you before getting your consent.

We hope you will let us know what is to be done so that we can act accordingly.

But, this is merely a consent to receiving and forwarding the goods and will not be responsible for anything else.

For this reason we are obliged to write to you with the request that you will make your decision and inform us accordingly.

If delivery of goods can be conveniently taken at Klang, it would be better to send them by steamer, besides the freight would be also cheaper.

Dated, 8th day, 1st Moon, Ting (Chou Year) =18th February (1937).

Choped: Correspondence Seal of Kwong Mun Woh Kongsi, Penang.

Now, where the duty of giving an explanation is cast upon a defendant, and an explanation is given, which is consistent with innocence, the Court must consider whether it might reasonably be true although not convinced its truth. The learned Magistrate does not appear to have given his attention to this matter.

In view of the evidence of the translator, the explanation that the accused was not aware of the contents of the goods in question, and considered them undutiable (an explanation which was consistent with innocence) might reasonably be true although the Court might not be convicted of its truth.

Therefore the accused should have been acquitted. The appeal is accordingly allowed, and the conviction and sentence are quashed; any fine paid to be refunded to the appellant. Duty will, of course, have to be paid.

Appeal allowed. Finding and sentence reversed. Accused acquitted.

[APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

WAN ALI BIN WAN ABDULLAH..... Appellant

against

PUBLIC PROSECUTOR.....Respondent.

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 4 of 1937]

(KUANTAN).

Section 409 of the Penal Code — Criminal breach of trust by a public servant-section 406 of the Penal Code—Criminal breach of trust.

To bring an offence within section 409 of the Penal Code it is necessary to show that property was entrusted to a public servant and that he accepted the property entrusted, being in his public capacity required or authorised to accept it.

The test is the liability of Government to make good the loss of the moneys entrusted under section 10 of the Government Suits Enactment (Cap. 17).

The appellant was penghulu of his Kampong and two persons, applying for land, paid monies to him in respect of fees payable to the Collector of Land Revenue. Appellant applied for land on their behalf and gave them receipts but did not pay the money to the Collector of Land Revenue.

K. K. Benjamin for appellant.

C. H. Whitton, Deputy Public Prosecutor, for Public Prosecutor.

CUSSEN, J.—I see no reason to interfere with the Magistrate's finding of facts. I am of opinion it is correct. But I consider the facts did not constitute an offence under section 409 of the Penal Code but under section 406, Penal Code.

It was no part of the duty of the accused as Penghulu to receive such deposits as in this case; he was neither authorised nor required to do so; he could, without failing in the slightest in his official duties, have refused to accept these monies.

These monies were not due to Government. He was not entrusted with these sums in his capacity as a public servant.

It is quite clear that the Government is not liable to make good the loss of these monies under section 10 of the Government Suits Enactment; and this, I think, is a decisive test.